

STATE OF MICHIGAN
COURT OF APPEALS

CITY OF GRAND RAPIDS,

Plaintiff/Counter-Defendant-
Appellee,

v

F & M FOODS, INC.,

Defendant/Counter-Plaintiff,

and

RONALD H. MARSHALL, SR.,

Defendant/Counter-Plaintiff-
Appellant,

and

THAD M. FIELDS,

Defendant.

Before: Fort Hood, P.J., and White and Borrello, JJ.

PER CURIAM.

Defendant Ronald Marshall appeals as of right the trial court's order granting summary disposition under MCR 2.116(C)(10) to plaintiff. For the reasons set forth in this opinion, we reverse and remand the matter to the trial court for a trial.

Defendant, along with Thad Fields, incorporated F & M Foods, which, from February 2000 until August 2002, ran a Church's Chicken at 1025 Division Street in Grand Rapids. Defendant was president of F & M Foods. F & M Foods failed to pay the personal property taxes assessed by plaintiff in the years 2001, 2002, and 2003. In February 2003, plaintiff informed F & M Foods that it owed more than \$4,500 in unpaid taxes and fees and that its lien on F & M Foods' personal property for the unpaid taxes was prior and superior to all other liens. Plaintiff also informed F & M Foods that, if F & M Foods failed to pay the taxes, it would collect the taxes by seizing F & M Foods' personal property. Following receipt of the lien, defendant,

for the benefit of F & M Foods' secured creditors, sold some of F & M Foods' personal property for \$9,000.

Plaintiff filed the present lawsuit against F & M Foods, Fields, and defendant to recover the unpaid taxes. Defendant filed a counter-claim for set-off for the costs he incurred for removing equipment from 1025 Division and then storing this equipment, both of which he did at the direction of plaintiff. Plaintiff soon thereafter moved for summary disposition on its complaint. It argued that, because defendant's actions left F & M Foods unable to pay the unpaid taxes, defendant was liable for the unpaid taxes. The trial court agreed, stating that our holding in *Muskegon v Amec, Inc*, 62 Mich App 644; 233 NW2d 688 (1975), fully resolved the issue, and ordered F & M Foods and defendant, jointly and severally, to pay \$8,451.81, the amount in taxes, interest, and fees F & M Foods owed as of April 2006.

On appeal, defendant first claims that the trial court erred in relying on *Amec, Inc, supra*, because it is factually distinguishable from the present case. Defendant further claims that whether he properly performed his duties as an officer of F & M Foods is a question of fact and that a trier of fact could find that his actions in selling some of F & M Foods' personal property were reasonable when secured creditors were demanding their security, plaintiff failed to seize any property, and he believed that F & M Foods was exempt from paying taxes because 1025 Division was located in a Renaissance Zone. We review a trial court's decision on a motion for summary disposition de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). Summary disposition is proper under MCR 2.116(C)(10) if the affidavits and documentary evidence presented, viewed in the light most favorable to the non-moving party, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

In *Amec, Inc, supra*, Amec owed \$35,239.07 in personal property taxes to the City of Muskegon. Its officers and directors approached the City of Muskegon to seek a solution for Amec's tax problem. The City of Muskegon agreed to refrain from exercising its right to levy on Amec's personal property for Amec's promise to pay its delinquent personal property taxes in installments. After this agreement was reached, the officers and directors of Amec caused property, belonging to Amec and subject to the City of Muskegon's lien, to be moved outside the City of Muskegon's jurisdiction. The officers and directors of Amec then disposed of the property without notice to the City of Muskegon. The officers and directors also dissolved Amec. The City of Muskegon brought suit against Amec and the individual officers and directors. The defendants moved for summary disposition, which the trial court denied. This Court granted leave to appeal the denial of summary disposition to the defendants, and affirmed, stating the issue on appeal as follows:

The issue before us is whether a complaint stating that the individual directors and officers of a corporation disposed of the corporation's property upon which a city's tax lien was attached, outside the city's jurisdiction, and stating that the same individuals also caused the corporation to be dissolved leaving it without sufficient assets to meet its known outstanding debts, sufficiently states a claim upon which relief can be granted as against those directors and officers. [*Id.* at 645-646.]

The *Amec* panel then stated that, “when read together,” MCL 600.3605 and MCL 450.1551 “permit a lien creditor to bring an action against the directors of a corporation for the dissipation of corporate assets during the process of dissolution in the face of known debts.” *Id.* at 647. The *Amec* panel ended the opinion with the following paragraph:

Defendants would have this Court hold that directors and officers of a corporation who have knowledge of a valid tax lien could, nevertheless, without incurring any personal liability in the process, remove the property subject to the lien out of the taxing authority’s jurisdiction, dispose of it, and then dissolve the corporation despite having knowledge that by their actions, the corporation would be left without sufficient assets to meet its known debts. We believe that this result would be contrary to the express language of § 3605 of the Revised Judicature Act and § 551 of the Business Corporation Act, and also contrary to the legislative intent behind these statutes. To accept defendants’ contentions would be to ignore the clear statutory liability as expressed in these sections. This we will not do. [*Id.* at 648-649.]

Before we begin our analysis of whether the trial court, in granting summary disposition to plaintiff, erred in relying on *Amec, Inc, supra*, we note that defendant’s claim that plaintiff, having missed its chance to seize F & M Foods’ personal property under MCL 211.47, went beyond the corporate form to impose liability on him is without merit. First, MCL 211.47 does not apply to the present appeal. In *Amec, Inc, supra* at 648, the panel explained the limits of an action brought pursuant to MCL 211.47:

The defendants argue that, since the corporation is uncollectible, the plaintiffs’ suit is, in reality, a § 47 tax collection suit under a different guise and must, therefore, be controlled by § 47. Although their argument that § 47 is an exclusive remedy when the action is for the recovery of delinquent personal property taxes is sound law, such is not the case here. The case of *Laketon Twp v Akeley*, 74 Mich 695, 697; 42 NW 165 (1889), states the limits of a § 47 action. It states that “when suit is brought *directly to recover the tax*, the statute is express that it must be brought against the person ‘whom it is assessed’”.[sic] (Emphasis added.) Here, the action is not being brought against the defendants *directly to recover the tax*, but, instead, plaintiffs’ action can be said to seek damages for defendants’ violation of their statutory duties. [Footnote omitted.]

Likewise, plaintiff’s action against defendant is to seek damages for defendant’s violation of his statutory duties to F & M Foods. Second, the doctrine of piercing the corporate veil does not apply to the present case. A corporation is considered a legally distinct entity from its shareholders. *Dep’t of Consumer & Industry Services v Shah*, 236 Mich App 381, 393; 600 NW2d 406 (1999). Nonetheless, the corporate structure will be disregarded, and the shareholder will be liable for the acts of the corporation, when the equities are compelling, such as when the stockholders used the corporate entity to avoid legal obligations or when there is evidence of fraud, illegality, or injustice. *Bitar v Wakim*, 456 Mich 428, 431; 572 NW2d 191 (1998); *Shah, supra* at 393; *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 457; 559 NW2d 379 (1996). Although defendant was a shareholder of F & M Foods, plaintiff did not sue him as a shareholder, and it never requested the trial court to pierce the corporate veil of F & M Foods. Rather, plaintiff sued defendant, as an officer of F & M Foods, for violating his statutory duties.

The crux of this Court's holding in *Amec, Inc, supra*, was because the city was suing the officers and directors of Amec for violation of their statutory duties, rather than Amec, the city's lawsuit was not controlled by MCL 200.47. This Court merely decided that, pursuant to MCL 600.3605 and MCL 450.1551, the City of Muskegon had stated a cause of action. The trial court erred in granting summary disposition to plaintiff in sole reliance on *Amec, supra*, because *Amec* simply stands for the proposition that plaintiff's claim is viable. Plaintiff must still prove that defendant breached his statutory duty.

According to plaintiff, defendant violated the statutory duty of MCL.1541a(1), which provides as follows:

(1) A director or officer shall discharge his or her duties as a director or officer including his or her duties as a member of a committee in the following manner:

(a) In good faith.

(b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances.

(c) In a manner he or she reasonably believes to be in the best interests of the corporation.

Absent fraud, an officer or director of a corporation is liable only for ordinary negligence. *Dykema v Muskegon Piston Ring Co*, 348 Mich 129, 136; 82 NW2d 467 (1957). Ordinary negligence is the "omission of that care which every man of common prudence takes in regard to his own affairs." *Id.* Good faith is not a valid excuse for the negligent mismanagement of a corporation:

"It is not enough to excuse a director that no actual dishonesty is shown, nor that he was influenced by other than disinterested motives. Good faith alone will not excuse them when there is a lack of the proper care, attention, and circumspection in the affairs of the corporation, which is exacted of them as trustees." [*Dinsmore v Jacobson*, 242 Mich 192, 195-196; 218 NW 700 (1928), quoting 4 *Fletchers Cyc., Corporations*, § 2465.]

Generally, what constitutes a proper performance of the duties required by an officer or director of a corporation is a question of fact, which must be determined in view of all the circumstances. *Martin v Hardy*, 251 Mich 413, 416; 232 NW 197 (1930). Because the trial court failed to examine the facts presented by defendant as to whether his payment to other creditors constituted a breach of his duty of proper performance, we reverse the decision of the trial court granting summary disposition to plaintiff.¹

¹ Plaintiff invites this Court to hold that when an officer of a corporation receives notice of a tax lien from a taxing authority, failure to pay the tax lien after disposing of property which was
(continued...)

Defendant further claims that the trial court erred in ordering him to pay the full amount of F & M Foods' unpaid personal property taxes because plaintiff failed to establish the amount for which the property would have sold at auction. Defendant conceded that the amount of damages available to plaintiff is the value of the property sold. See MCL 600.3605(1)(b); *Amec Inc, supra* at 648. Defendant, however, believes that the value of the property equals the amount for which it would have sold at auction. Defendant has failed to provide us with any authority supporting his position. We therefore reject this contention. We note, however, that defendant may properly submit evidence regarding the usual expense of auction in countering evidence of plaintiff's loss due to his sale of the property.

Defendant finally claims that the trial court, by closing the case when it granted summary disposition to plaintiff on its complaint, denied him a hearing on his counter-claim for set-off. Neither party moved the trial court for summary disposition on the counter-claim, nor at any time argued the merits of the counter-claim. Under these circumstances, the trial court erred in stating that, because its "order fully resolves all claims against and by both remaining defendants, [its] order closes the case."

Reversed and remanded. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Helene N. White

/s/ Stephen L. Borrello

(...continued)

subject to the lien leads automatically to a judicial finding that the corporate officer's act of disposing of the property constitutes a violation of the proper performance doctrine as a matter of law. Because neither statutory authority nor case law exists to support such a holding, we decline plaintiff's offer.